No. 10930

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

EIVIND ANDERSON and CONTINENTAL CASUALTY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit of A. G. RUSHLIGHT & CO., a corporation and the FIRST NATIONAL BANK OF PORTLAND, OREGON, a National Banking Corporation, and W. L. REID doing business as W. L. REID COMPANY,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Charles H. Leavy, *District Judge*

Brief of Appellees

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Appellees.

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The question involved in this case is simple, viz: Was Rushlight entitled to $12,118.00 additional for doing the power house work according to changed plans and specifications?

The answer is, of course, found by examining the parties' contract. If the work under the changed specifications is included in the written contract, Rushlight cannot recover. The trial court held that this changed work was outside of and not contemplated by the original subcontract.

The judgment of the trial court was correct because: (1) as a straight proposition of law the changed

work was not included in the original sub-contract (2) as a matter of fact the parties did not intend to include the changed work in the original sub-contract.

In other words, on the face of the contract itself the changed work is not included; and, if you look behind the contract, then you find that the parties did not intend the work to be included.

The trial court decided that the case entirely as a question of fact, that is, decided from all of the evidence that the parties did not intend that this changed work should be included in the subcontract, but intended that it should be paid for as an extra, Trs. 28-31; 388-399.

Although the evidence was in violent conflict, and although the court made extensive and detailed Findings of Fact on the factual issues herein involved, appellant's brief completely ignores those findings, never mentions them, and bases its arguments on the thoroughly discredited and court-rejected testimony of Anderson. For this reason it is necessary for us to rather completely restate the facts. The mere re-statement of facts argues the case.

I.
STATEMENT OF CASE

The sub-contract is Exhibit 7. It describes the sub-contract work to be done by reference to specific sections and pages of the government master plans and specifications.

The government specifications, Ex. 2, are divided into specially labeled and numbered sections corresponding generally to the several trades, i.e., painting, plumbing, heating, electrical, mechanical and so forth.

The sub-contract, Ex. 7, Tr. 72, provides that Rushlight is to do the following work:

> "Section 2. The Subcontractor and the Contractor agree that the materials to be furnished and work to be done by the Subcontractor are as follows:
>
> Plumbing, heating, and mechanical installation work called for by bid form, addenda No. 1 to 5, incl., special condition and drawings, and as further covered by specifications sections:
>
> P 1-P21 incl.
> ME 1-ME 15 incl.
> H 1-H 17 incl.
> TH-HV 1-TH-HV 17 incl.
> HA 1-HA 7 incl."

This controversy arises out of a change in the mechanical (ME) specifications. It will be noted that the sub-contract *does not* refer to the "substituted" or "M.E. (sub)" specifications. It refers only to the original specifications.

The work was done under the "M.E. (sub)" specifications; and Anderson was paid extra by the government for doing the work under the substituted ME specifications.

The sub-contract is dated May 15. On May 21 Rushlight wrote, Exhibit 10, Tr. 93, stating that he understood that Anderson had now received formal approval covering the change in the power house, therefore, he would like to have a "*change order* from you covering the additional cost of this work and instructions to proceed" with the changed work. To this letter, Anderson replied the next day by letter, Ex. 11, Tr. 94, saying:

> "You are advised that the government has approved the change in the power plant * * * . This change involves revisions in mechanical equipment, including the foundation and boilers. *You are hereby instructed* to make the necessary changes in the mechanical installations involved by the change in the government plans and specifications as may be affected by your subcontract"

It will be noted that *this letter is the change order.* Had the original subcontract covered this matter, there was no need for a "change order"; no need to say "you are hereby instructed to make the necessary changes."

Nothing speaks so eloquently as the parties' actions right at the time the work is being done. Within a couple of days after the contract was signed Rushlight asked for a "change order" and Anderson gave it to him. If the change was covered by the subcontract Anderson certainly would have said so right at that time.

This "change order" letter of Anderson's also requests Rushlight to give an immediate breakdown statement. This Rushlight promptly furnished on May 26, by Exhibit 12, Tr. 97. The last item on that breakdown (see Tr. 98) is: "Change order covering revisions in power plant as per our proposals dated April 30, 1941 —$12,118.47."

Anderson admits that when he received this breakdown specifically setting forth the change order and price, he said nothing, Tr. 96. In fact, the first time Anderson ever denied this item was when this suit was brought. Tr. 186. As intimated by the trial court, just common honesty would require Anderson to immediately speak up at the time of this correspondence, Tr. 397.

It is advisable to go back and trace the history of the contract.

Anderson submitted his original bid on April 8, 1941, and the bids were opened the same day. Although Anderson was low bidder, the officers in charge recommended against awarding the contract to him. Tr. 263-5. This was because of Anderson's unsatisfactory reputation. Anderson, with Rushlight's attorney, then went to Washington and used political influence (proper) to get the contract. Before leaving Washington, Anderson was promised the contract. However, the contract was not formally awarded to him until May 8,

1941, when he received his "Commence Work" order (see Ex. 1). The actual contract was not signed until a later date.

However, about April 26, after Anderson had returned from Washington, and after Anderson had been orally promised the contract, the Army, by letter, Ex. 3, asked Anderson to submit a supplemental proposal omitting the original heating plant and boiler house shown on the original plan and described in the original M.E. specifications and substituting therefor, a plant as shown on new plans and "as described on pages ME 1 (sub) to ME-15 (sub) of specifications * * *"; see Ex. 3, Tr. 59.

After this Army request for a new proposal Rushlight worked out a detailed proposal covering his part of the proposed change and offering to do his part of the changed work for an additional $12,118.47 over the job as originally planned. Under date of April 30, Anderson worked out a statement covering his part of the work in detail and included Rushlight's part for the lump sum of $12,118.47. Rushlight's proposal was attached as an exhibit to Anderson's proposal. An original signed copy of Anderson's letters to the Government with Rushlight's letter attached is in evidence as Exhibit 4, Tr. 129-31.

A few days after Exhibit 4 was made, Anderson submitted a new proposal, Ex. 5, Tr. 64 on the changed

work. This proposal was accepted by the Army's letter date May 14, Ex. 6; but the contract between Anderson and the government was not formally changed until the issuance of the government's "Change Order A" Exhibit 26, Tr. 326, dated May 23, 1941, by which Anderson received his extra compensation for this change made under the "substituted" ME specifications.

It should be carefully noted that during this time, Anderson knew how to refer to the *substituted* or "sub" specifications because, by Exhibit 3 the Army so referred to them; and by Exhibit 5 of May 6, Anderson refers to them as "ME-1 (sub) to ME-14 (sub)." This is important because when Anderson drew the contract of May 15, Ex. 7, he did not refer to either the revised plans or the substituted specifications. In fact, Anderson testified that he was negligent in drawing the contract because it refers only to the old provisions of the original bid, Tr. 497.

It will be recalled that when it looked as though Anderson's low bid was going to be turned down, Anderson called Rushlight and it was agreed that Anderson and Mr. C. C. Hall, Rushlight's attorney, would go to Washington, Tr. 29. Before going on the trip to Washington, Anderson assured Rushlight that he would get the subcontract:

> " * * * that at said time the plaintiff Rushlight desired assurance that he would be given the sub-

> contract for plumbing and heating and at said Spokane meeting the defendant, Anderson, gave the plaintiff, Rushlight, assurance that Rushlight would be given the subcontract for plumbing and heating if the contract were awarded to Anderson by the government." Tr. 29, Finding of Fact X.

As soon as Anderson was sure he was going to get the main contract, Anderson "made up his mind not to give the contract to Rushlight because plaintiff Rushlight expected the award of the contract to be for $300,000.00" (Finding of Fact X. Tr. 29). This was undoubtedly due to the fact that on May 6, Anderson received a proposal to do the work for $286,000.00 which was $14,000.00 less than Rushlight's figure of $300,000.00. When Rushlight knew that Anderson was going back on his oral commitment for $300,000.00, Rushlight decided, for moral effect, to take his attorney, Mr. Hall, to see Anderson, because Mr. Hall had been back to Washington and had greatly helped Anderson in getting the contract.

The parties, Rushlight, Hall, Anderson and his son, and a Clyde Philp met at Anderson's home on the evening of May 9. At that meeting the principal matter of discussion was price. It was finally agreed that Rushlight would do the work for $293,000.00, thereby split-this meant "revised" price, that is, revised from $300,000.00 and a low figure of $286,000.00 which Anderson had just received. Tr. 29-30. When this was done, Rushlight wrote on the proposal of May 9, Ex. 8, Tr. 85, the

word "Revised." Anderson contended that this meant "Revised" plans, whereas Rushlight contended that this meant "revised" price, that is, revised from $300,000 to $293,000. The court found (Finding X, Tr. 30) that this word "revised" referred to the drop in price and not to the change in plans:

> " * * * that the word 'revised' which was written on said letter, Exhibit Ptf No. 8, was written thereon for the purpose of indicating a revision from the controverted sum of $300,000.00 and $286,000.00, and that said letter and said designation 'revised' were not intended to cover a new and increased cost of construction in accordance with the government's modified program on the power plant;"

Following this proposal of May 9, Anderson, on May 10, wrote Rushlight, Exhibit 9, Tr. 91, accepting Rushlight's proposal of $293,000.00. Anderson's letter does not mention the changed plans or substituted specifications. Then, on May 15, the formal subcontract Ex. 7, Tr. 72, was signed. This subcontract was prepared entirely by Anderson, Tr. 71, 321, who was not content with the printed form but added several pages of typed provisions. Of course, this agreement merges all prior conversations and agreements and measures the rights of the parties. As previously observed, this subcontract makes no mention of "substituted" mechanical specifications but refers only to the original specifications. In the specially prepared typewritten part of the subcontract "paragraph 1" describes and

lists the numerous main contract documents which are made part of the subcontract, but carefully omits the "ME 1 (sub) to ME 14 (sub)" specification. Tr. 78. In this connection it should be observed that the original ME specifications described in the subcontract and which are found in Exhibit 2 consists of ME-1 to ME-15, whereas the "sub"specification, Ex. 15, contains but 14 paragraphs.

Soon after the subcontract was signed on May 15, Rushlight, by Exhibit 10, Tr. 93, asked Anderson for a "change order" on the change in the power plant. In reply to this, Anderson, on May 22nd, by Exhibit 11, Tr. 94, gave Rushlight a written change order saying:

> "You are *hereby* instructed to make the necessary changes in the mechanical installations involved by the change in the government plans and specifications as may be affected by your sub-contract."

In the same letter, Anderson asked for a breakdown, which Rushlight furnished on May 26th, Exhibit 12, Tr. 97, showing the exact cost of the power house change as $12,118.000. Rushlight wrote two letters on May 26th, one Ex. 12, containing the $12,118.00 extra item and the other, Ex. 13, covering another matter. Anderson replied, by Exhibit 14, on May 28 to one of said letters but made no reference to the other or the item for $12,118.00.

After admitting that he received the letter, Ex. 12, of May 26, containing the $12,118 extra item, Anderson testified that he did not reply, saying:

> "Q. Yes, did you acknowledge that or send any reply?" "A. I don't think there was any occasion to send any reply. I got what I wanted, or what I attempted to get." Tr. 96.

After reciting the above facts the Court found on this point (Finding 10) Tr. 31:

> "That the written subcontract of May 15, 1941, between plaintiff and defendant was not intended to cover and did not cover the additional cost of constructing the power house plant in accordance with the Government's modified or substituted plans and specifications; that the plaintiff is entitled to the sum of $12,118.00 as an extra on the power plant."

At the close of the evidence, the Court rendered a long, oral decision, Tr. 391-399, which is the basis for Finding of Fact 10, covering this $12,118.00 item.

As heretofore indicated, it is our contention that the decision of the trial court was correct, (1) as a matter of law, (2) as a matter of fact.

II.

THE DECISION IS RIGHT AS AN ABSOLUTE MATTER OF LAW.

1. It is fundamental that all prior conversations and negotiations are merged in the final written contract.

Therefore, the true question is whether Exhibit 7, the written subcontract itself, covered this $12,118.00 change in the power house. To decide this we must examine that subcontract and not the conversations. If the contract is clear and unambiguous it alone governs. If it is not clear, then we look to the surrounding circumstances which the trial court held clearly showed that this extra was not included in the original subcontract.

2. Since everything was merged in the writing, Ex. 7, let us examine it. Remember that Anderson alone prepared it and chose its language. The subcontract contains no reference whatsoever to the "sub" specifications or the "revised" plans under which the changed work was done. A much clearer idea of the contract will be had by examining the original instrument because of the way it is physically set up; see Exhibit 7.

The contract provides that the subcontractor will do the plumbing, heating and mechanical installation work "called for by *bid form,*" "drawings," and as "covered by specifications Sections:"

"P 1-P 21 incl.
ME 1-ME 15 incl.
H 1-H 17 incl.
TH-HV 1-TH-HV 17 incl.
HA 1-HA 7 incl."

A. The *bid form* which is Exhibit 31, Tr. 354, is the original bid and is dated April 8, and, of course, was long before this $12,118.00 change was contemplated.

Hence, the work we were to do under the subcontract is just what the subcontract says, to-wit: "the work called for by the bid form."

B. Immediately following the above description of the work the subcontract continues:

> "Unit prices as established by general contractor's proposal to the Government *April* 8, 1941, shall be binding on the parties hereto." Tr. 73.

Again we see that the reference is clearly back to the original bid of April 8, not to any subsequent change.

C. *Most important of all,* is the clear contract designation of the work as work "covered by specifications Section * * * ME 1-ME 15 incl." (See Trans. 73 and original Ex. 7). No reference is made to the new plans or to the substituted ME specifications. The work was done under the substituted ME specifications, Tr. 133.

It will be recalled that on April 26, the Army wrote Anderson a letter, Ex. 3, asking for figures on the power house changes. That letter clearly states that the work shown on ME 1 to ME 15 is to be omitted and that there is to be *substituted* a heating plant, boiler house "described on pages ME 1 (*sub*) to ME 14 (*sub*)." The term *"substitute"* is used at least four times in that one letter.

In response to the Army's request, Anderson first prepared Exhibit 4, Tr. 129, showing the increased

cost and including the specific figure of $12,118.47 for Rushlight's increased cost. Shortly thereafter, Anderson prepared and submitted to the Army, Exhibit 5, Tr. 64, a proposal dated May 6, covering this work. In that proposal, Anderson says: "—I hereby propose to construct the boiler house * * in accordance with * * ME-1 (sub) to ME-14 (sub) * * * for the sum of $23,142.00 additional."

Both the Army and Anderson referred to this changed work in a specified manner, to-wit: "ME-1 (sub) to ME-14 (sub)." The "sub" and "ME" specifications make a document too large to print in the transcript but are before this court as Ex. 15.

Therefore, since the new and more expensive work has a clear, special designation, known and used by the parties, it will not be covered by the subcontract unless specifically mentioned. Anderson knew how to use the term "ME-1 (sub) to ME-14 (sub)" and deliberately omitted it from his written subcontract which he alone prepared. Hence that change work was not covered.

This view is made certain beyond any question when we find that just a few days later, to-wit, on May 21, Rushlight writes to Anderson, Exhibit 10, Tr. 93, stating:

> "We understand that you have now received formal approval covering the change in power plant * * *
>
> We would appreciate a change order from you covering the additional cost of this work and in-

> structions to proceed with the construction of the power plant as revised."

If the changed work had been covered by the subcontract which had just been signed a few days before, Rushlight would have written no such letter. Certainly, if Anderson thought the change was covered he would have replied by emphatically and forcibly telling Rushlight that such work was covered by the subcontract. However, Anderson replied the same day, saying, in effect: "Yes, our change has been approved; that change is so and so; and *this is your order* to make such necessary change in the work covered by your subcontract as may be affected by the change order." We quote Anderson's letter, Ex. 11, Tr. 94:

> "In reply to your letter of May 21, you are advised that the government has approved the change in the power plant * * *. This change involves revision in the mechanical equipment * * *.
>
> You are *hereby* instructed to make the necessary changes in the mechanical installation involved by the government plans and specifications as may be affected by your subcontract."

As shown by that Exhibit, number 11, the changed work was not done by Rushlight under the original subcontract of May 15. It was done under that written change order of May 22nd, signed by Anderson in response to Rushlight's request for "a change order from you." Rushlight had asked for an order, "we would appreciate a change order from you" (Ex. 10, Tr. 93) —and Anderson came back on the following day with

Exhibit 11: "You are hereby instructed to make the necessary changes."

In the same letter ordering the changes, Anderson asked for a breakdown statement. Rushlight immediately forwarded this on May 26th, Exhibit 12, Tr. 97, and included, Tr. 98, the item of $12,118.47. To this Anderson made no objection and no reply.

We therefore find: (1) that the subcontract by its very terms does not include the work covered by ME-1 (sub) to ME-14 (sub); (2) that the instruction to do this additional work was given by Anderson in writing by a special "change order" after the subcontract was signed.

That the subcontract does not mention this changed work is plainly shown by Anderson's own testimony in response to the court's question Tr. 494:

> "The Court: Well, now is there anything in this Exhibit No. 7 which is this sub-contract agreement * * * that indicates it should include this modified heating plant? A. *No, I don't think that document there specifically calls for anything about that.*"

Further, Anderson testified that he was negligent in drawing the contract. In fact, he admitted that the way the contract was written it refers to the original bid and the original boiler, saying, Tr. 497:

> "The Court: Mr. Anderson, why didn't you, when this contract was formally signed on the 15th of April, (May) so as to put this matter com-

pletely at rest concerning the modified major contract, write in there something to that effect so there would have been no room for misunderstanding? A. I think, Your Honor, there might be some sort of negligence there in the matter of writing this up, and naturally, if that contract was enforced literally as it is written there, he would have to put in three boilers of the small type under the old provision of the bid—called for bid or specification.

The Court: But your testimony in the previous hearing and on this trial was that you relied very heavily on that word written in in longhand 'revised,' and if it became a material matter on the 8th or 9th of May, a week later when the formal instrument was signed by both parties, then it would seem to the Court that it would have been so much more important that it be covered in some manner."

We submit, that as a matter of law, no evidence was admissible to vary or add to this written subcontract by attempting to add thereto the work covered by ME-1 (sub) to ME-14 (sub) which was an entirely new, different and more expensive thing than called for by the express terms of the written subcontract.

D. The very most that can be said is that some ambiguity arises when Anderson tries to make the specific terms "ME-1 to ME-15" mean "ME-1 (sub) to ME-14 (sub)."

It is an elementary rule that all uncertainties and ambiguities are to be resolved against the person who prepared the contract.

> "Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter. It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist." 12 *Am. Jur.* p. 795-96, Sec. 252.

Anderson alone prepared the contract. Anderson's testimony that the subcontract does not call for anything on the modified heating plan (Tr. 494-5); and that he was negligent in writing up the contract because if the subcontract "was enforced literally" then Rushlight would have to put in the old boilers called for in the original bid (Tr. 497), indicates very clearly that the above rule should be applied and the ambiguity, if any, resolved against Anderson.

E. We have seen how both parties to the contract interpreted it at the very first time the matter came up, a few days after the contract was written. Rushlight did not consider the change in the heating plant as included and asked for a "change order" (Ex. 10, Tr. 93). Anderson immediately gave him the "change order" without even hinting that the work was covered by the original contract. (Ex. 11, Tr. 94). This

was the parties' own interpretation of the contract at the time the matter was fresh in their minds.

Interpretation by the parties is a great, if not controlling influence.

> "In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact, the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed the parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions." 12 *Am. Jur.* p. 787-789, Sec. 249.

In the notes to the above quotation there are many Federal cases cited. See particularly *District of Columbia vs. Gallaher,* 124 U.S. 505; 31 L. Ed. 526 at 531; *Brooklyn Life Ins. Co. vs. Dutcher,* 95 U.S. 269; 24 L. Ed. 410 at 412).

Thus we find that Anderson testified in court that the subcontract "as written," calls for the original boil-

er and work. Anderson, at the time the work was going on, must have so understood his subcontract because when asked to give a "change order" he immediately gave it and made no suggestion that the change or substituted work was covered by the subcontract. Nothing could be clearer than that all of the parties believed and intended the original subcontract to relate only to the original work and expected the changed work to be performed under the "change order" as extra work. This is exactly the way the government handled it.

F. DATES OF GOVERNMENT CONTRACT.

The only thing that lends even a slight color of validity to Anderson's story is the dates and order of events. However, this very superficial appearance of validity disappears when you see how the government handled its contract and this item.

Anderson's claim is that the parties knew informally that the government was going to change the power house before the subcontract of May 15th was signed; that therefore the changed and substituted work must be included in the subcontract.

The original bids were on April 8th. On April 26th, by Exhibit 3, the Army asked Anderson for a quotation on the proposed substitution. On May 6th, Anderson by Exhibit 5, Tr. 54, gave a price and was orally advised that the change would be made. Tr. 266. Likewise, on May 6th, Anderson was advised by letter, that

the main contract was awarded to him. See Ex. 1. However, the main contract itself was not written up or signed by the government or Anderson for several months; that is, until August 11th. Tr. 266, 270.

There was plenty of opportunity for the government to place the substituted items in the original contract because those items were known and ordered many months before the original contract was signed. However, the Army kept the power house change as a matter entirely separate and distinct, Tr. 271-2. It gave its approval to the change on May 14, Exhibit 6, but did not actually deliver the formal document "Change Order A," Ex. 26, Tr. 326, until September 5th, although that government Change Order A is dated May 23rd, Tr. 325.

It will thus be seen that the practice on these Army jobs is to keep the changes or substitutions completely separate; to handle any substantial change such as this by a separate, formal instrument.

Thus the fact that the substitution was known before our subcontract was dated with Anderson, does not mean that the change was included in our subcontract any more than it would mean that such change was included in Anderson's main contract, simply because Anderson's contract was made up and signed by Anderson long after the change was agreed upon.

With the foregoing explanation it is easy to understand why, on May 21 (subcontract dated May 15), Rushlight asked for a formal change order; why on May 22, Anderson gave Rushlight a formal change order, and made no contention that the change was included in the subcontract; why Anderson made no objection when Rushlight, on May 26th, gave him the price of $12,118.00 for this extra.

We submit that as a matter of law, the written subcontract did not include this item covered by "ME-1 (sub)-ME-14 (sub)" specification; that as a matter of law, this item was separately ordered by Anderson after the subcontract was made and must be paid for as an extra, just as Anderson was paid for it as an extra by the government.

III.

AS A MATTER OF FACT, THE CHANGE IN POWER HOUSE WAS NOT INCLUDED IN THE $293,000.00 ORIGINAL SUBCONTRACT. THE PARTIES DID NOT INTEND TO INCLUDE THIS CHANGE IN THE ORIGINAL SUBCONTRACT.

The court based its decision almost entirely on questions of fact.

We have already seen that as a matter of law, this $12,118.00 change in the power house is not included in the original subcontract. Our discussion on that

point necessarily also indicated that as a matter of fact, the parties never intended that this changed or substituted power house should be included in the $293,-000.00 subcontract figure. We now discuss this more fully from a factual standpoint.

Rushlight testified repeatedly that neither the proposal of May 9th, Ex. 8, or the subcontract of May 15, Ex. 7, was intended to include the $12,118.00 additional cost of the change of the power plant. Tr. 173-4; 138-9. Anderson testified to the contrary.

The trial court very aptly observed that there is nothing on the face of the subcontract, Ex. 7, to suggest, or to indicate in any way that the work called for by the "ME-(sub)" specification was included in that contract. The only thing that gave him any concern was that the proposal of May 9, Ex. 8, is marked "revised," Tr. 396. The contract itself bears no such notation either on it or by its contents.

The Court found that the word "revised" referred to a *revised price,* and not to revised plans or work. With this finding it necessarily followed that the $12,-118.00 power plant item is extra work, not included in the subcontract.

Finding of Fact No. 10, Tr. 28-31, is a complete story of the highlights of this case. It is controlling and should be read. The same Findings of Facts are set forth in the Court's oral opinion, Tr. 388-99.

There was a violent conflict in the testimony. The trial court found with Rushlight and found that Anderson testified fasely on nearly all major points. In fact the trial court said:

> "Now from that point on we come to the evidence here that—evidence in sharp conflict. If the Court finds the facts to be as the plaintiff Mr. Rushlight testifies they were, then, of course, Mr. Anderson has made mis-statements that are impossible of belief and would shake the Court's credibility in this testimony." Tr. 391.

After making the above statement, the Court found with Rushlight and against Anderson. We will later point out some fifteen or more specific and vital points upon which Anderson testified falsely. However, before doing this we should briefly sketch the background of the case so that the Court's irresistible findings as to the *intention* of the party will become clear.

On April 8 the bids were opened. Anderson was low. The contract was not awarded to him immediately as was customary. The same day Rushlight learned that Anderson was not going to get the contract and so advised Anderson; but Anderson only scoffed. Tr. 119. Rushlight was anxious for Anderson to get the contract so that he could get the subcontract for plumbing and heating. Rushlight then told Anderson that if Anderson found what Rushlight said was authentic, then he, Rushlight, would be glad to help. T. 119. Several days later Anderson called Rushlight and told him that he

had learned that they were going to give the contract to the second bidder. Tr. 120. It was then agreed that Rushlight and Anderson should meet in Spokane in a few days and that Rushlight would bring his Portland attorney, Mr. C. C. Hall; that Hall would go back to Washington to help Anderson get the contract. The three parties met in Spokane. Before Hall would go back to Washington, Rushlight and Hall wanted assurance that if the contract were obtained for Anderson that the subcontract at $300,000.00 would be given to Rushlight. Thereupon, Anderson and Hall went to Washington by plane and spent several weeks together. They occupied the same room, first in a private home, and later at the hotel. Anderson paid the hotel bills and all expenses and gave Hall $100.00 expense money. Through the use of political influence (proper), the contract was promised to them and they left. Tr. 195-8.

Shortly after Anderson arrived home, and before the contract was actually awarded to Anderson, the Army decided to make some changes in the power house called for by the April 8th bid. It issued some new plans and new or substituted ME specifications, Ex. 15, and on April 26, by Exhibit 3, asked for figures. Anderson and Rushlight prepared a bid, Ex. 4 on this change.

This signed bid by Anderson specifically includes Rushlight's part of the changed work at a figure of $12,118.00. Later, on May 6th, Anderson submitted a

slightly different figure on these changes or extras, and it was accepted.

The same day, May 6, Anderson was given a letter (in Ex. 1) advising him that the main contract was awarded to him. Also, on the same day, Anderson received an offer from one Hastorf, Ex. A-28, Tr. 275, to do the plumbing and heating work under the original contract (not including the power house change) for $286,000. Having secured his contract from the government with Rushlight's help Anderson now decided to renege on his agreement with Rushlight, because Rushlight expected $300,000.00 and Anderson could now get the work done for $286,000.00. Thereupon, Rushlight took Mr. Hall to see Anderson because Hall had gone to Washington to help get the contract. Rushlight and Hall met with Anderson and his son at Anderson's home on the evening of May 9. Clyde Philp (Anderson's bondsman and called as a witness by Anderson) was also present. The chief discussion was about the contract price. As a result of the meeting, Exhibit 8, Tr. 85, was signed, fixing the price at $293,000.00, which was just half way between Rushlight's original figure of $300,000.00 and the $286,000.00 price which Anderson had from Hastorf on May 6th.

All witnesses agreed that the subject of revised or substituted plans or work on the boiler house was not even mentioned that evening. Anderson testified, Tr. 318:

"Q. Well now, you never discussed that that evening at all. You never even mentioned the boiler situation that evening?

A. No, because we had discussed it so thoroughly before, there was really no occasion to go over and discuss it again. That was covered.

"Q. All right, there was no discussion of the boiler situation—revised boilers—at all on May 9th?

A. Not that I recall * * * "

The proposal, Ex. 8, was originally dated April 3, 1941, by typewriter. This was changed in longhand on May 9, 1941, and the word "revised" was written in by Rushlight.

Anderson and his son testified that the change to "May 9," and the writing of the word Revised, were simply to bring the proposal up to date. (See Tr. 221; 317). In fact, Anderson testified: "Personally I don't think we saw any great significance in that word 'Revised.' " Tr. 498.

Rushlight testified that the word "Revised" was used to indicate a change or revision from his original $300,000.00 price to $293,000.00. Tr. 138, 167, 385. Clyde Philp, though called as a witness by Anderson, testified that the $293,000.00 did not include the change in the boiler house but related only to the original bid, saying:

"A. It was my understanding from both their understandings that the boiler house change was —figures was not included in this two ninety three." Tr. 457.

"A. Well, it was my understanding that that price of two ninety three did not include any boiler house." Tr. 469.

In addition to the above testimony, we have the facts: That both the proposal, Exhibit 8, and the subcontract, Ex. 7, describe only the original work, and neither, in any way, mention the new ME (sub) specification; that within a few days, May 21, Ex. 10, Rushlight asked for a "change order" and on May 22, by Ex. 11, Anderson gives the change order on this item; that on May 26, Rushlight gives the breakdown showing the cost of the changed work at $12,118.00; that Anderson never objected to that item until this suit was started; that the government itself carried the item separately throughout and issued its change order, Ex. 26, as of May 23rd, which was subsequent to the date of the subcontract.

From the foregoing, the Court could hardly help but find as it did:

" * * * that the word "Revised" which was written on said letter, Exhibit Ptf. No. 8, was written thereon for the purpose of indicating a revision from the controverted sum of $300,000.00 and $286,000.00, and that said letter and said designation 'revised' were not intended to cover a new and increased cost of construction in accordance with the Government's Modified Program on the Power Plant;"

"That the written subcontract of May 15, 1941, between plaintiff and defendant was not intended to cover and did not cover the additional cost of constructing the power house plant in accord-

ance with the Government's modified or substituted plans and specifications; that the plaintiff is entitled to the sum of $12,118.00 as an extra on the Power Plant." Tr. 30, 31.

(See also Tr. 28, Finding of Fact No. 10; also Opinion, Tr. 387-400).

IV.

FALSE TESTIMONY OF ANDERSON

We have never seen a more brazen perjurer than defendant Anderson. We point out only a few of the more obvious mis-statements.

1. To begin with, it should be remembered that Anderson's reputation was such that the local (Tacoma) and San Francisco Army officers would not award the contract to him even though he was low bidder.

2. The court started his opinion:

> "If the Court finds the facts to be as the plaintiff Mr. Rushlight testifies they were, then, of course, Mr. Anderson has made mis-statements that are impossible of belief, and would shake the Court's credibility in his testimony." Tr. 391.

The Court then adopted Rushlight's testimony and found for him and against Anderson.

3. Anderson testified repeatedly that he never had a bid or discussed price with Rushlight prior to May 6. Tr. 251, 283, 313.

The Court found that Rushlight had given Anderson a price even before the bids were open on April 8. Finding 10, Tr. 28-29; Opinion, Tr. 392.

4. Anderson testified repeatedly that he was not having any trouble in getting his bid accepted by the government. Tr. 231, 288. That he did not know that his bid was going to be rejected. Tr. 51.

The Court held this untrue, saying:

> "I can not find with Mr. Anderson's testimony and upon his contention that he still believed after these bids were opened for some time thereafter that he was going to get this contract. I must find that he knew very shortly after the opening of the bids that his bid would be rejected * * * " Tr. 393. See also Tr. 29.

5. Anderson tried to make it appear that Rushlight called him about going to Washington, instead of admitting that he called Rushlight for help. Tr. 231, 287.

The Court held Anderson's testimony false. Tr. 393, 29

> " * * * I therefore find, based upon the testimony of the plaintiff Rushlight, that it was the defendant Anderson who called him some three or four days subsequent to the opening of the bids and suggested that some steps be taken to insure the securing of this contract * * * " Tr. 393.

6. Anderson repeatedly told a fantastic story that the meeting of Anderson, Rushlight and Attorney Hall in Spokane (which resulted in the trip to Washington) was a mere coincidence, an accident, instead of a prearranged affair. Tr. 52-4, 231-35, 287-293.

This whole story the Court held to be absolutely false. Tr. 393, Tr. 29.

> " * * * and that the meeting in Spokane was not an accidental or incidental meeting, but one which resulted in a prearranged plan." Tr. 393.
>
> " * * * that an arrangement was made between the plaintiff Rushlight, the defendant Anderson, and Mr. C. C. Hall, attorney of Portland, Oregon, for a meeting at Spokane, and at said Spokane meeting further arrangements were made for the defendant Anderson and Mr. Hall to go to Washington, D. C., for the single purpose of securing said contract;" Tr. 29.

It is hard to realize that anyone would deliberately fabricate such a complete story about this Spokane meeting and the subsequent trip to Washington, D. C. Just to read the testimony of Anderson, Tr. 52-4, 231-35, 287-293, in the face of the other facts shows his dishonesty. Of course, the Court based his opinion on the testimony of others as well as the inherent improbabilities of Anderson's story.

7. Anderson testified repeatedly that Hall and Rushlight were going to Washington on some business of their own instead of on his contract and hence that the meeting was accidental. Tr. 52; 232-3-4; 293.

Mr. Hall testified that his sole and only purpose of going to Washington was on Anderson's contract, Tr. 199, and the Court so found, Tr. 29; 394.

8. Anderson repeatedly testified that he never at any time, prior to May 6 promised the subcontract to Rushlight. Tr. 233; 283; 251.

The Court held this false and found that shortly after April 8, Anderson promised the contract to Rushlight:

> "* * * That at said time the plaintiff Rushlight desired assurance that he would be given the subcontract for plumbing and heating and at said Spokane meeting the defendant Anderson gave the plaintiff Rushlight assurance that Rushlight would be given the subcontract for plumbing and heating if the contract were awarded to Anderson by the government." Tr. 29; 393.

(See Mr. Hall's testimony Tr. 195-6.)

9 Anderson repeatedly testified that he told Hall and Rushlight that he did not need or want any political help. Tr. 293; 233; 348.

While this statement, from a man going to Washington to use political influence to get a big contract is absurd, nevertheless the Court found that it was false; that Anderson specifically arranged for this help. Tr. 393-4.

10. Anderson repeatedly testified that he did not know that Mr. Hall was a lawyer but thought that Hall was engaged in the plumbing business. Tr. 52; 89; 282-3.

No man can travel to Washington on the plane with Mr. Hall; sleep in the same room with him, Tr. 197; pay his hotel bill, Tr. 198; advance traveling expenses, Tr. 198; appear before the various departments in Washington, and generally be with him for

nearly two weeks, Tr. 196, without knowing that his sole business was that of an attorney.

11. Anderson first testified that he did not pay Hall's expenses, Tr. 53, but later admitted that he did pay them and gave a fantastic excuse. Tr. 235.

12. On the most vital point of all—what took place on May 9, when Rushlight's proposal, Ex. 8, was submitted—Anderson gave deliberate false testimony. Anderson and his son testified repeatedly that on that occasion there was no discussion of price whatsoever. Tr. 255; 317; 495; 222-3.

The Court found that in that four hour meeting "the adjustment of the subcontract price was the primary and major subject of discussion." Tr. 30; 395.

13. Anderson testified that he suggested the $293,000.00 figure, without any relation to any other factor, and that it was agreed upon on May 6. Tr. 251-3; 314-16.

The Court found that this figure was agreed upon on May 9 and was a compromise between Rushlight's original figure of $300,000.00 and a recent low bid of $286,000.00. Tr. 31; 396.

14. Anderson at first denied that he had ever seen or received the very important "ME (sub)" specifications, Ex. 15, Tr. 57; 102-9; then admitted receiving them, Tr. 239.

15. Anderson even denied his own signature on the document, Ex. 4, which showed the price of the extra work there involved, Tr. 61-2. Later he admitted it. Tr. 278.

16. Anderson first admitted that he made no reply to Rushlight's letter, Ex. 12, setting out the extra cost of this change order. Tr. 96; but later changed his story and gave it an unbelievable explanation, Tr. 505-6.

The foregoing are but a few of the many deliberate false statements made by Anderson. We have passed over innumerable minor falsehoods which Anderson used as the background to bolster up the false impression he was trying to create.

SUMMARY

Even Anderson testified that, if taken literally, the subcontract refers to the old specifications and does not include the new work. Tr. 497. Hence, the very best that Anderson can do is to look to outside testimony to establish the *intent* of the parties. However, on sharply controverted testimony, the trial court finds all of the facts against Anderson; finds that the parties did not intend to include this $12,118.00 item in the original subcontract.

FINDINGS OF FACT ON CONTROVERTED EVIDENCE ARE CONCLUSIVE

Larsen v. Portland-California S.S. Co., 66 Fed. (2d) 326;

Metro-Goldwyn-Mayer v. Sear, 104 Fed. (2d) 892;

Adair v. Shallenberger, 119 Fed. (2d) 1017;

British-American Assur. Co. v. Bowen, 134 Fed. (2d) 256.

V.

ANSWER TO APPELLANT'S POINT 1

A. Pages 11 to 23 of Anderson's brief are devoted to arguing that the change in power house work is not an extra. Anderson's argument is all based on the proposition that since the fact that the substituted work was to be done, was known before the subcontract was actually written, that therefore the substituted work must be included.

The argument heretofore made in this brief clearly shows that notwithstanding the fact the changed work was known before the subcontract was signed, nevertheless: (1) That the substituted or revised work was not mentioned in the proposal of May 9, Ex. 8; (2) Was not mentioned in the actual subcontract itself, Ex. 7; (3) Was not actually formally ordered by the government until "Change Order A" Ex. 26, dated May 23; (4) That this change order revision was treated as a separate, independent item, and "extra" throughout,

by both the government and these parties; (5) That Rushlight asked for a formal "change order," Ex. 10, on this very item and was given a formal written "change order" by Anderson, Ex. 11.

In addition to the foregoing, Anderson's brief, page 8, admits that in "the subcontract as written," "no specific reference is made to the revision in type of boilers;" and at the trial Anderson admitted that he was negligent in preparing the subcontract, because the subcontract actually referred to the original specifications and not the substituted specification. Tr. 497.

Therefore, the best that can be said is that there was an ambiguity. The court then heard all the evidence on *intent* of the parties and found that the parties did not intend to include this item in the subcontract.

B. In Anderson's brief, pages 11-23, as well as in his statement of the case—there is a vague suggestion that because part of the changed work was sublet to Roy Early Co., and the cost charged against Rushlight's contract that this, in some mysterious manner, prevented the work from becoming an extra.

If Anderson's brief means that the ordering of the boilers on May 6, is some evidence from which to argue that the changed power house was included in the subcontract, then we must agree that it is argumentative,

but the apparent force of such argument is overwhelmingly destroyed by the other evidence in the case.

The purchase of the boilers is easily understood. Rushlight thought he had an agreement with Anderson; the boilers were in great demand and hard to get and had to be snapped up quickly; they could be resold any time; Rushlight thought he was safe in purchasing them. Tr. 216, 217. Rushlight had been dealing with Early when he was making up his part of Ex. 4, which, Tr. 131, shows a difference of $12,118.00 between the original and substituted power house. Rushlight's breakdown is attached to Anderson's own letter, Ex. 4, as an extra to be paid by the government.

Clearly, as shown by Exhibit 4, this item was treated as an extra on April 30 by both Rushlight and Anderson. There is not one single word of testimony by Anderson or anyone else that this item had changed its status between April 30 (when Ex. 4 was made up) and May 6 when the order was given to Early. Consequently when Rushlight and Anderson ordered the boilers from Early on May 6 and 7 (Ex. 17) they still were ordered as extras—an extra for which the government itself did not issue a formal change order until May 23, Ex. 26.

If Anderson's brief actually means that the changed power house was not furnished at all by Rushlight, then such a suggestion is plainly dishonest. Such a

suggestion is being first made by Anderson's brief in this court. Anderson was represented by different counsel in the lower court but we doubt that even a change of counsel justifies so unfair a change in the theory of the case.

Of course, even Anderson's brief, Page 6, admits that the only reason Anderson, instead of Rushlight, signed the contract with Early was so that Early could avoid selling to an Oregon firm which was outside his sales territory, Tr. 211. Rushlight instructed Early to handle it this way, and the purchase was charged back to Rushlight's account, Ex. 17.

A comparison of Early's contract, Tr. 212-14, with the Rushlight breakdown, Tr. 131, will show that there were many big items which Early did not furnish, for example, soot blowers, stoker, breeching, pump, tools, cleaners, expanders, front plates and so forth.

Probably the most convincing answer to this malodorous new suggestion is that Anderson, himself, considered that Rushlight was doing this work and furnishing the material because otherwise, there is no possible way to explain Exhibits 10 and 11 where Rushlight asked for a "change order" to cover this additional work and where Anderson says: "you are hereby instructed" to do this work.

It seems most inconsistent that Anderson would spend days testifying, and his brief using many pages

arguing that these changes are included in the $293,-000.00 subcontract, and at the same time suggest that these extra changes had nothing to do with Rushlight because perchance they were ordered in Anderson's name but charged to Rushlight.

No doubt we have misunderstood Anderson's brief because the heading of his first argument is: "The boiler revision was part of appellee's subcontract and not an extra."

C. DECISIONS CITED

We have carefully read the cases cited by appellee's brief, Ps. 19-23. They have so little to do with the issues in this case as to require no comment whatsoever.

V.

ANSWER TO APPELLANT'S POINT 2

Claims for extras must be made within one week.

The argument made by Anderson under this heading seems to be ridiculous and without foundation whatsoever.

The provision relied upon by appellant is very general and is simply that claims must be made in writing within one week from the date incurred.

1. It may be admitted, for the sake of argument that such provisions, though greatly disliked by the courts, will be enforced if the court can find no way,

by waiver or otherwise, to avoid them. See complete annotation, 66 A.L.R. 649.

2. However, in this case, the extra was ordered in writing by Anderson. The subcontract was signed on May 15—and on May 21, by Exhibit 10, Rushlight asked for a written "change order," and on May 22, by Ex. 11, Anderson gave Rushlight a written order to make this change.

Thus, the order was in writing—and within one week from the date of the contract. It was good under any possible contention.

3. In one place, appellant's brief (P. 24), suggests that the week started to run on May 6—prior to the time the contract was signed. This contention, of course, is absurd; but if it had any validity then the evidence showed that the exact claim, in the exact amount, was set up by Rushlight's Exhibit 4, Tr. 129, on April 30th, and approved in writing by Anderson the same day by Exhibit 4.

4. There is no showing when the work was actually done to fix the running of the "one week" provisions—but we do know that the written claim and order were within one week from the date the contract was signed.

5. These provisions are for the protection of the owner—and in this case, the owner was at all times fully advised in writing on this point and himself gave the extra order.

6. The written order from Anderson, Ex. 11, of May 22, is prior to the government's order to Anderson, Ex. 26 of May 23.

VI.

ANSWER TO APPELLANT'S POINT 3

Evidence does not support Finding No. X (Appellant's brief 27-28).

Finding X governs this entire appeal. Appellant has dismissed that entire finding by saying that since Rushlight was mistaken on an inconsequential point that Finding X is therefore without sufficient proof.

The quotation given by appellant at page 28 is very unfair and misleading. While it is true that Rushlight testified that he did not know Anderson prior to this deal—and that when his memory was refreshed he remembered meeting Anderson on prior occasions —nevertheless this was of no moment. Rushlight had no business dealings or social contacts with Anderson, Tr. 284-5; 442. The Court was of the opinion and found that Rushlight's mistake was unintentional, Tr. 514, and based the finding on the fact that Anderson himself testified, Tr. 480: "I was sure that Mr. Rushlight's face was familiar with me prior to April 8." See also Tr. 284.

The Court not only believed Rushlight and Mr. Hall on sharply conflicting evidence but had the benefit of all surrounding facts and written documents.

Against this was the fantastic and utterly unbelievable testimony of Anderson.

CONCLUSION

In conclusion we respectfully submit: That the subcontract, on its face, and as a matter of law, did not include this extra work; that the extra work was separately ordered in writing by Anderson after the subcontract was made; that the evidence overwhelmingly supports the Court's findings that it was not the intention of the parties to include this extra work in the subcontract.

The judgment should be affirmed.

Respectfully submitted,

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